VIRGINIA WATER PROTECTION PERMIT PROGRAM REGULATION AND ASSOCIATED VIRGINIA WATER PROTECTION GENERAL PERMIT REGULATIONS

CITIZEN ADVISORY GROUP

MEETING #8 - NOTES - DRAFT

MEETING MONDAY, DECEMBER 8, 2014
DEQ PIEDMONT REGIONAL OFFICE – TRAINING ROOM

Meeting Attendees

CITIZEN ADVISORY GROUP MEMBERS	*INTERESTED PARTIES*	*SUPPORT STAFF*
Steven E. Begg – Virginia Department of Transportation	Tom Broderick – Loudoun Water	Melanie Davenport
Jason P. Ericson – Dominion Resources Services, Inc.	Alicia Connelly – City of Norfolk	Dave Davis
Katie Frazier – Virginia Agribusiness Council	Roger Cronin – Greeley & Hansen LLC	Scott Kudlas
Karen Johnson – The Nature Conservancy (TNC)	Justin Curtis - AquaLaw	Sarah Marsala
Bob Kerr – Kerr Environmental	John DeResa – Prince William County Service Authority	Mike Murphy
Greg Prelewicz – Fairfax Water	Christopher Gill – City of Norfolk	Bill Norris
Mike Rolband – Virginia Homebuilders Association	Chris Harbin – City of Norfolk	Ann Regn
Peggy Sanner – Chesapeake Bay Foundation (CBF)	Tracey Harmon – Virginia Department of Transportation	Brenda Winn
Beth Silverman Sprenkle – EEE Consulting, Inc.	Steven Herzog – Hanover County Department of Public Utilities	***OTHER DEQ STAFF***
William T. (Tom) Walker – US Army Corps of Engineers	T.J. Mascia – Troutman Sanders LLP	Elizabeth Andrews
	James Parker - VMBA	Trisha Beasley
	Nikki Rovner - TNC	Lee Crowell
	Mark Williams – LUCK Companies	Steve Hardwick

NOTE: Citizen Advisory Group Members NOT in attendance: Nina Butler – Virginia Manufacturers Association/Mission H2O; Skip Stiles – Wetlands Watch

1. Introductory Comments – Discussion of Process and Schedule for the Day (Bill Norris):

Bill Norris welcomed all of the meeting attendees to the 8th meeting of the VWP Citizen Advisory Group. He thanked everyone for their commitment to and their participation in the process. He thanked all of those who have submitted comments on the draft revisions being discussed today and noted that those comments have been posted to the VWP Regulation webpage at http://www.deq.virginia.gov/lawsregulations/developingregulations/vwppregulatoryaction.aspx.

2. **Notes from Previous Meeting – November 3, 2014 (Bill Norris):**

Bill Norris noted that he had distributed the notes from the Special meeting of the VWP Citizen Advisory Group that was held on Monday, November 3rd to specifically address surface water withdrawals. He asked for any edits to those meeting notes. Staff noted that they might have some editorial changes that would be needed. It was suggested that the notes were too long to read through.

ACTION ITEM: The meeting notes will be posted as "final" to Town Hall as amended by the Advisory Group and staff comment and suggestions.

3. **Welcome & Introductions – Opening Statements (Mike Murphy/Melanie Davenport/Bill Norris/Ann Regn):**

Mike Murphy welcomed everyone to the meeting. He noted that we would be trying to go through a new section being proposed for inclusion in the VWP General Permits – 9VAC25-690-25 and then we would be starting a review and discussion of the proposed edits to the main regulation, 9VAC25-210. He thanked all of those who had submitted comments.

Melanie Davenport added her thanks to all those for coming to today's meeting and their continued contributions to the process.

Bill Norris asked everyone to make sure that they signed in on the "Sign-In List" so that we can have a record of those in attendance. He asked for introductions from the group.

Ann Regn noted that she would be trying to take a more active role in the facilitation of today's discussions so that the group focuses its efforts and discussions on the technical issues related to the proposed amendments and revisions. She asked for those with specific wordsmithing recommendations to make sure that they submitted them for consideration by the staff. She reviewed the rules of conduct for the advisory group that had been distributed at the first meeting of the advisory group:

GUIDELINES FOR ADVISORY GROUP DISCUSSIONS

Put your cell phones either in the off position or on "vibrate" as to not to disrupt the discussions of the Advisory Group.

Listen with an open mind and heart – it allows deeper understanding and, therefore, progress.

Speak one at a time; interruptions and side conversations are distracting and disrespectful to the speaker. "Caucus" or private conversations between members of the audience and people at the table may take place during breaks or at lunch, not during the work of the group.

Be concise and try to speak only once on a particular issue, unless you have new or different information to share.

Simply note your agreement with what someone else has said if you feel that it is important to do so; it is not necessary to repeat it.

If you miss a meeting, get up to speed before the next one, as the Advisory Group cannot afford the luxury of starting over.

Focus on the issue, not the speaker – personalizing makes it impossible to listen effectively.

Present options for solutions at the same time you present the problems you see.

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4. **VWP General Permit Term and Transition (Brenda Winn):**

Brenda Winn provided an overview of the proposed VWP General Permit language and the concepts behind the proposed revisions to the General Permits to address "permit term" and "Transition" found in new section 9VAC25-690-25 - Effective date of VWP general permit; transition between general permits. She noted that this proposed language/section is being proposed for inclusion in all of the General Permits to address the concept of transition between general permits.

9VAC25-690-25 A:

- The current General Permits expire on August 1, 2016. The new effective date of the general permit of August 2, 2016 and new expiration date of the general permit of December 31, 2026 is included in all of the VWP General Permits – to provide a 10 year general permit term;
- 9VAC25-690-25 A has been revised since it was distributed to the Advisory Group on 11/14/14 to delete the proposed language related to "an extension of coverage is granted";

Group Discussions included the following:

- It was suggested that it might be better if the group could go through these changes from the beginning instead of starting at some point in the general permit regulation. *Staff Response: This section of the general permit regulation is one of those key items that staff feels needs to be discussed and agreed to by the group before moving forward. Once this section has been addressed the plan is to start at the beginning of the main VWP regulation and go through the proposed amendments page-by-page.*
- A question was raised as to whether the concept of "administrative continuance" is defined in the regulation. *Staff Response: Yes.*

9VAC25-690-25 B:

- 9VAC25-690-25 B contains language to address "any permittee having a valid authorization for coverage under the expiring VWP general permit on or prior to August 1, 2016 shall be automatically granted coverage". This is designed to provide a transition mechanism between the expiring and the new general permit. There is currently no transition provision in the existing general permits – this is designed to get everyone on the same page.

Group Discussions included the following:

- A concern was raised regarding language in 9VAC25-690-25 B related to a permittee "not coordinating with DEQ to resolve noncompliance". It was suggested that this language was very open-ended – it is too open-ended. *Staff Response: The intent here is that the permittee is not currently coordinating with DEQ in any way with a noncompliance issue. The intent here is to make sure that DEQ and the permittee were working together and were in communication to address any noncompliance issues – if they were not then there would be no mechanism for automatically continuing a general permit.*
- There should be no automatic continuance when a permittee is not in compliance. The concept of "automatic continuance" should not be considered when a permittee is not in compliance. *Staff Response: This section is designed to address a situation that staff will have to deal with come August 1, 2016.* This concept is included in another section of the regulation and is being raised here for consideration of the concern in both places.
- It was suggested that a solution might be to add a "decision point" for DEQ to address any concerns about "administrative continuance", i.e., on a case-by-case basis.
- The idea of "administrative continuance" is that the permittee needs to have a permit renewal and DEQ for one reason or another is unable to get to the issuance of that renewal, i.e., the permittee is blameless for the delay. The concept included in this section is looking at providing administrative continuance in a case where the permittee has some noncompliance issues that are causing the delay, i.e., the permittee is not blameless – so why would DEQ provide them with an administrative continuance? *Staff Response: What is being contemplated is a permittee is technically in noncompliance but staff has worked out a consent order, maybe we are just waiting to get that to the Board for approval or maybe we are just waiting for the needed "fix" approved by management. What staff is trying to address is someone who is already in the process of achieving compliance but maybe not every "T" has been crossed.*
- It often takes a permittee 5 or 6 months to get final approval from DEQ for getting back in compliance. It was acknowledged that does take time but the language is so broad that it could be used by someone who is outside of this current process, but someone who has just recognized that they are not in compliance – who decides to just start at that point – so let's talk now – would they be given an automatic continuance? It is very open-ended.
- Is there some way to say that if a permittee is at some specific point in negotiations with DEQ over a noncompliance issue that they would be granted an administrative continuance? What points of action would need to be specified?
- If the point of administrative continuance is that the permittee is blameless then why would this language related to noncompliance be needed here? *Staff Response: "Administrative continuance" is "permittee is blameless". They have submitted an application, they got it in on time, but DEQ has for one reason or another been unable to process the application. Currently, we have a situation where we have folks who have been covered by the existing permit and given an authorization that goes to 2017 or 2018 date, which we can't honor, because the regulation expires in 2016. This is an interesting permitting procedural conundrum for DEQ.*

Unfortunately we did not think through what that meant with an expiration date in the regulation and having an authorization that went past that date. This proposed language is targeted to those folks who have been told that they have coverage under this permit past the expiration date – we can't honor that commitment without some "fix" in the general permits. 9VAC25-690-25 B is not about "administrative continuance" it is fixing a procedural problem that we created the last time with issued this permit. That is why it doesn't carry forward and doesn't track with "administrative continuance".

- It was noted that this language seems to be fairly well limited in this instance but the concept and this language is also included elsewhere in the regulations. *Staff Response: It seems that "telling somebody that you don't qualify automatically coverage under this new permit because you are not in compliance" would actually be akin to terminating somebody's coverage because they were in "noncompliance" – so maybe it needs to track along that language. We just don't want to "throw the baby out with the bath water" for those permittees who are trying to resolve their issues of noncompliance.*

ACTION ITEM: Staff will look at clarification of the proposed language in 9VAC25-690-25 B addressing "automatic coverage concepts related to those not coordinating with DEQ to address noncompliance".

- Wouldn't there be circumstances where you would want need to permit to get through the "noncompliance"? *Staff Response: Staff will need to look back at the proposed language and see if there is a way to "fix" it – maybe fixed milestones related to compliance need to be established.* It was suggested that wording similar to "DEQ has approved but is waiting for the Board to bless" might be appropriate.
- *Staff Note: Does the group conceptually concur that this Paragraph B is designed to just fix that permitting fix for those "transition permits"?*

CONSENSUS: The group agreed to the concept of the permitting transition fix proposed in 9VAC25-690-25 B.

- It was suggested that even though it would be more work for the staff, that DEQ consider development of a "preamble", similar to what the federal government does for their regulations that identify all of the concerns and conversations and discussions that lead to a certain regulatory concept at the beginning of their regulations. *Staff Response: There will be a file of all of the conversations and discussions and decisions that have been made related to the ultimate regulatory language and concepts maintained on this regulatory process. The records from previous discussions related to past regulatory actions related to these regulations have also been retained in our regulation files.*
- It was suggested that the language should be clear enough so that we know that Part B is only applicable to that one section and that it is intended to "sunset" at some point in time. *Staff Response: Staff will clarify whether we can and what tools are available to "sunset" a provision.*

ACTION ITEM: Staff will make inquiries related to options available to "sunset" a provision of a regulation.

- It was suggested that a solution might be to just include language to specify "for those permits issued or authorized by a specific date". *Staff Response: The first sentence in 9VAC25-690-25 B could be rewritten to read: "Any permittee having a valid authorization for coverage under the VWP general permit which is expiring on August 1, 2016 shall be automatically granted coverage…"*

ACTION ITEM: 9VAC25-690-25 B will be rewritten to start with the sentence: "B. Any permittee having a valid authorization for coverage under the VWP general permit which is expiring on August 1, 2016 shall be automatically granted coverage…"

9VAC25-690-25 C:

- This section addresses all new applicants for a general permit on or after August 2, 2016. Language is also included to provide for application for an individual permit if conditions warrant or the applicant desires to go the route of an "individual permit" rather that a "general permit". *Staff Response: Staff noted that they had struggled with that concept and concern. There had been some consideration given to language that backed the dates up and said that DEQ would not accept any permits after a certain date.*
- It was suggested that the wording of C should be revised to read: "C. Permit authorizations issued on or after August 2, 2016 shall be processed…"
- C 1 is designed to address those situations where there is not enough time left in the current regulation term to do your project. Staff has considered a number of options for actions needed up until the expiration date – some end points were considered, such that after a specified time, then DEQ would not do anything with a permit application until the next regulation term, i..e, no applications would be accepted under the old regulation – that concept got to be too convoluted – the decision was made to just say that an applicant can apply anytime they want, they could apply the day before, but here are going to be your options.

Group Discussions included the following:

- It was suggested that instead of the August 2, 2016 date that shouldn't this be looking at a period such as 45 days prior to that date? An applicant is not going to apply for the old expiring permit; they would be applying for the new permit.
- It was suggested that the proposed language in C and C 1 seem to say that if DEQ receives an application on July 20th that it would be processed under the expiring permit. It should be that if an application is submitted on July 20th that DEQ would start the process for approval under the new permit that would be effective on August 2nd. *Staff Response: That would be the case if the applicant tells DEQ that they are applying for the new permit. The risk is whether the application is administratively complete – because in a couple of days you might not know that*

it is incomplete or not. If it is not complete then you are not getting coverage. There needs to be some way to tell DEQ whether you are applying for the permit that is expiring in X days or for the new permit that is active in X days?

- A suggestion for a revision of the first sentence to 9VAC25-690-25 C was made: "C. Authorizations issued for coverage beginning on or after August 2, 2016 shall be processed in accordance…"

ACTION ITEM: Staff will look at a revision of the proposed language in 9VAC25-690-25 C to read: "C. Authorizations issued for coverage beginning on or after August 2, 2016 shall be processed in accordance…"

9VAC25-690-25 C 1/C 2/& C 3:

- These items lay out the available options for processing of authorizations issued for coverage beginning on or after August 2, 2016.

9VAC25-690-25 C 1:

- C 1 provides the option when there is not adequate time to process an application.

Group Discussions included the following:

- The language in C 1 is fine as long as we don't find ourselves in the situation of having a span of time where an applicant in literally in limbo trying to figure out how to have a project authorized rather than sitting idle waiting for something to happen. *Staff Response: The reality is that if an applicant finds themselves in a situation where they have to start a project on July 15, 2016, DEQ can issue coverage under the existing General Permit, because the new General Permit doesn't exist until August 2, 2016, but the applicant will have to apply for authorization under the existing general permit and pay a permit fee and then turn right around and apply for authorization under the new general permit and pay another permit fee. That is what the proposed language in C 1 is trying to explain.*

9VAC25-690-25 C 2:

- C 2 is an attempt to capture where there is time to process the application; the applicant receives an authorization, but there is not enough time to actually start the activities.

Group Discussions included the following:

- A suggestion was made to delete the proposed language in C 2 and then cover the concept by adding a couple of words in the proposed C 3 to address the concern. It was suggested that it would be better to address this concern in the next section (proposed C 3). It was noted that permittees often need time for financing, pre-leasing or pre-sales, and local approvals after

VWP issuance to commence construction. Requiring a new permit under new, unknown terms is detrimental to the Virginia economy. There is a difference in the determination of "commencement of activities" between the Corps and DEQ – the Corps includes "design" in its concept of "commencement" while DEQ "commencement" is actually pushing dirt. In the private world it will sometimes take 2 or 3 years to get the permits, zoning, site plan approvals and financing put together. We need the permit to be able to get all of those things.

9VAC25-690-25 C 3:

Group Discussions included the following:

- The wording of this proposed section should be revised to include reference to "commencing and completing" the authorized activities. The section should be revised to read: "C 2. Where an authorization for coverage under this VWP general permit is granted by the board at any time during the term of this general permit, and there is insufficient time to commence and complete or to complete the commenced, authorized activities…"
- This item should address work that is under contract. These are dealing with projects that are under contract. It was suggested that if an entity such as VDOT has a contract that they are going out to bid on that they are actually not under contract.
- It was suggested that this same chance needs to be made to language in C 2 f.

ACTION ITEM: Staff will look over the proposed language in C 2 and look at deleting that language and "beefing" up the language in C 3 to address concerns raised by the Advisory Group.

- A concern was raised over the use of the phrase "since original application". It was suggested that it would be more appropriate to use the phrase "since final authorization". The suggested language would read: "…The project activities shall have remained unchanged since final authorization, and the permittee shall be in compliance with the existing general permit…" This would help address those instances where the permittee had received a permit modification. It would refer to the most recent permit or the current permit modification since things may have been changed since the original application.

9VAC25-690-25 C 3 f:

- This list of required information is pulled directly from the application section of the regulations.

Group Discussions included the following:

- Based on earlier discussions, this language needs to be revised to read: "f. a signed statement specifying that the permittee intends to either commence or continue the activities in accordance with the submitted development and construction schedule…"
- It was suggested that the end of the statement be revised to change "since original application" to "since original authorization".
- A question was raised regarding the wording of the requirements for a "signed statement" by a responsible party. The need to ensure that the person signed the required statement is duly authorized to do so was noted.

9VAC24-690-25 C 4:

- This is related to the concept identified in C 3 and provides DEQ with a specific timeframe within which to verify the request received as per the previous section of the regulations (C 3) and then proceed with the same process that is normally followed for an application.

Group Discussions included the following:

- A question was raised over what types of reasons DEQ would have for denying such a request. Should those reasons be stated here? *Staff Response: We don't have a list handy – it would probably be the same reasons that DEQ would not consider any other request. Maybe the applicant doesn't meet the criteria. Maybe DEQ doesn't agree that you meet the criteria. Maybe DEQ disagrees with the proposed compensation plan. Maybe the proposed schedule isn't going to work.*
- It was suggested that maybe those reasons need to be clarified here. *Staff Response: It is probably not needed since DEQ is going to apply the same reasons across the board, this would not be treated as a special situation. There is a list of reasons in the regulations, but it is just not repeated here. We may be able to provide a reference back to the list that is in the regulations instead of repeating it here.*

ACTION ITEM: Staff will provide a reference back to the list of reasons for denying a request that is contained in the main regulation as clarification.

- *Staff Note: There is always this tension of making a regulation as straight forward and as simple as possible but still catch everything and trying to put everything in the regulation to cover every contingence and to provide all of the information even if it means repeating whole sections of text that it makes the regulation cumbersome.*
- Item 4 specifies that DEQ has a certain amount of time within which to verify the request, 15 days. The question is when can or should the applicant submit this request? Can they submit it after the permit expires or 2 days before the regulation expires? Should we specify by a certain date? *Staff Response: If your permit expired then that would be a bad time to submit a request.*

If you have a permit that is expiring, it is in your best interest to get that permit to DEQ before it expires with enough time to make sure that we will have time to approve it. The latest that it can or should be submitted is before that 15 day period before the expiration of the permit, but it would be better if it was submitted before that time. If there is an issue with the request waiting until that 15 days before the permit expires may be too late.

ACTION ITEM: The group was requested to submit any editorial or grammatical corrections to Bill Norris as soon as possible so that they can be incorporated into the next version of the regulation.

Dave Davis asked for clarification from the group whether they see any flaws with the concept that has been presented in this section of the regulations (9VAC25-690-25). This language is being proposed as a way to make the process as seamless as possible. If the group has no additional suggestions then staff will take into consideration the comments made today and will revise the text and route it back out to the group for comment on the January 8, 2015 meeting.

Group Discussions included the following:

- The group appreciated the efforts by staff to revise and clarify the requirements outlined in this section and are looking forward to reviewing the revised language.
- It was suggested that since this is just the first of the general permits and that this proposed language would be included in each of the other general permits that staff make an effort to make it easier to follow and read. It was suggested that DEQ might want to consider following the format used in the Nationwide Permits. In the Nationwide Permits, they have isolated at the very beginning of the permits, the activity specific parts, and all of the requirements are identical, all the conditions. Instead of repeating these requirements over and over again with the increasing possibility of multiple typos, just have one set of requirements that are the same across all of the general permits and have it in one place and then have any specific items related to each general permit included separately – don't repeat duplicate requirements. It would make it clearer.

5. **BREAK: 10:30 – 10:45:**

6. **Review of Draft 9VAC25-210-10 (Brenda Winn):**

Brenda Winn provided an overview of the proposed revisions to 9VAC25-210-10:

9VAC25-210-10. Definitions:

- The process is going to be a review page-by-page through the sections and through the document.

- The last sentence in the new definition of "authorization" or "authorization for coverage" was left out of the draft version that was distributed to the Advisory Group. The definition should read: "Authorization" or "authorization for coverage" means a signed letter from the board stating the applicant is granted the authority to conduct the proposed project in surface waters under the terms and conditions specified in the VWP general permit and any applicable authorization notes. A copy of the VWP general permit may be provided as an attachment.

Group Discussions included the following:

- A question was raised regarding the definition of "beneficial use" and the designation of offstream beneficial uses as "domestic (including public water supply), agricultural uses, electric power generation, commercial, and industrial uses. Shouldn't the term "uses" be repeated for each category for consistence? A suggestion was made to just include the term "uses" once at the end of the sequence of categories to clarify the sentence. *Staff Response: Staff suggested that this issue be put aside for later discussion so that the current process doesn't get sidetracked with a lengthy discussion.*
- It was suggested that prior to any changes being made to the definition of "beneficial use" that it was fairly consistent with the Code. *Staff Response: There are actually 2 definitions of "beneficial use" in the Code. The definition at 62.1-44.3 reads:*

"Beneficial use" means both instream and offstream uses. Instream beneficial uses include, but are not limited to, the protection of fish and wildlife resources and habitat, maintenance of waste assimilation, recreation, navigation, and cultural and aesthetic values. The preservation of instream flows for purposes of the protection of navigation, maintenance of waste assimilation capacity, the protection of fish and wildlife resources and habitat, recreation, cultural and aesthetic values is an instream beneficial use of Virginia's waters. Offstream beneficial uses include, but are not limited to, domestic (including public water supply), agricultural uses, electric power generation, commercial, and industrial uses.

- *The definition at 62.1-10 reads:*

"Beneficial use" means both instream and offstream uses. Instream beneficial uses include, but are not limited to, the protection of fish and wildlife habitat, maintenance of waste assimilation, recreation, navigation, and cultural and aesthetic values. Offstream beneficial uses include, but are not limited to, domestic (including public water supply), agricultural, electric power generation, commercial and industrial uses. Public water supply uses for human consumption shall be considered the highest priority.

- A concern was raised that since the Health Department's definition of "Safe Yield" is being deleted from their regulations that the statement regarding "domestic and other existing beneficial uses shall be considered the highest priority" should be included in the DEQ definition of beneficial use. *The definition at 62.1-242 reads: "Beneficial use" means both instream and offstream uses. Instream beneficial uses include but are not limited to protection*

of fish and wildlife habitat, maintenance of waste assimilation, recreation, navigation, and cultural and aesthetic values. Offstream beneficial uses include but are not limited to domestic (including public water supply), agricultural, electric power generation, commercial, and industrial uses. Domestic and other existing beneficial uses shall be considered the highest priority beneficial uses.

- It was suggested that the definition if "beneficial use" contained in the Code section that governs the VWP Regulation should be the definition uses. Which section of the Code governs the VWP program? *Staff Response: That is 62.1-44.3. The definition as originally proposed is statutorily consistent. The concerns related to the definition and the possible loss of a specific emphasis is a statutory one and is not one that can be addressed through a regulatory process.*
- A suggestion was made to include the phrase "to aquatic resources" in the definition of "Compensation". The definition would read:

"Compensation" or "compensatory mitigation" means the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, or in certain circumstances preservation of aquatic resources, or in certain circumstances an out-of-kind measure having a water quality, habitat, or other desirable benefit, for the purposes of offsetting unavoidable adverse impacts to aquatic resources which remain after all appropriate and practicable avoidance and minimization has been achieved.

- A suggestion was made to revise the definition of "construction site" by lifting the definition used in 9VAC25-210-60.11. It should be stricken in 9VAC25-210-60.11 and included in its entirety as part of the definitions. The definition would read:

"Construction site" means the land where any land-disturbing activity is physically located or conducted, including any adjacent land used or preserved in connection with the land-disturbing activity. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term "construction site" also includes any other land areas which involve land disturbing excavation activities, including quarrying or other mining activities, where an increase in run-off of sediment is controlled through the use of temporary sedimentation basins.

- A suggestion was made to revise the definition of "coverage" to read:

"Coverage" means authorization to conduct a project in accordance with a general permit.

- A suggestion was made to include the phrase "or aquatic resource" and revise the definition of "conversion" to read:

"Conversion" means those impacts to surface waters that permanently change an existing wetland or aquatic resource type to a different wetland or aquatic resource type.

- The group discussed the merits of the use of the terms "conversion" versus "impacts".
- It was suggested that any reference to soils should be deleted from the definition of "emergent wetland". The phrase "that is at least periodically deficient in oxygen as a result of excessive water content" should be deleted from the definition. Vegetation is the key concept here not soils. The definition of wetlands in the regulations deals with this concept.
- It was suggested that the term "characterized" should be replaced with the term "dominated" in the definition of "emergent wetland" to be consistent with the federal definition.
- The resulting definition of "emergent wetland" should read:

"Emergent wetland" means a class of wetlands dominated by erect, rooted, herbaceous plants growing in water or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content, excluding mosses and lichens. This vegetation is present for most of the growing season in most years and is usually dominated by perennial plants.

- A suggestion was made to revise the definition of "fill" to read:

"Fill" means replacing portions of surface water with upland, or ~~changing~~ raising the bottom elevation of a surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris.

- A suggestion was made to revise the definition of "fill material" to read:

"Fill material" means any pollutant which replaces portions of surface water with dry land or which ~~changes~~ raises the bottom elevation of a surface water for any purpose.

- A suggestion was made to revise the definition of "forested wetland" to be consistent with the Corps 1987 Supplemental Manuals to read:

"Forested wetland" means a class of wetlands ~~characterized~~ dominated by woody vegetation that is ~~six meters (20 feet)~~ approximately 20 feet (6 meters) tall or taller and 3 inch (7.6 cm) or larger diameter breast height (DBH). These areas typically possess an overstory of trees, an understory of trees or shrubs, and an herbaceous layer.

- The group discussed the concept of "multi-project mitigation site". It was noted that even though this is no longer allowed under the Federal program it is all just "off-site permittee responsible site" this is still part of VDOT's project options and would like to have the continued option to continue to do it.
- The group discussed the definition of "out-of-kind compensatory mitigation". It was suggested that the definition be revised to read:

"Out-of-kind compensatory mitigation" or "out-of-kind mitigation" means a measure that does not replace the same type of wetland or surface water as was impacted but does replace lost wetland or surface water functions or beneficial uses and provides a water quality, habitat, or other desirable benefit.

- A question was raised over the revised numbering sequence used in the definition of "pollution". *Staff Response: The numbering is being revised to match that used in the Code.*
- A suggestion was made to revise the definition of "scrub-shrub wetland" to be consistent with the federal definition and Corps 1987 Supplement Manuals. The definition would read:

"Scrub-shrub wetland" means a class of wetlands dominated by woody vegetation, excluding woody vines, approximately 3 to 20 feet (1 to 6 m) tall ~~less than six meters (20 feet) tall~~. The species include true shrubs, young trees, and trees or shrubs that are small or stunted because of environmental conditions.

- The concept of high water marks along each side of the stream was discussed. A suggestion was made to revise the definition of "stream bed" to include this concept. The definition should be revised to read:

"Stream bed" or "stream channel" means the substrate of a stream, as measured between the ordinary high water marks along each side of the stream. The substrate may consist of organic matter, bedrock or inorganic particles that range in size from clay to boulders, or a combination of both. Areas contiguous to the stream bed, but outside of the ordinary high water marks along each side of stream, are not considered part of the stream bed.

- The definition of "suspend" was discussed. A suggestion was made to revise the definition to read:

"Suspend" or "suspension" means a decision by the board or applicant stopping the review or processing of a permit application or request to modify a permit or permit authorization until such time that (a) information requested by the board is provided, reviewed, and deemed adequate to allow the review or processing of an application or request for modification to continue, or, (b) when the suspension was initiated at the applicant's request and the applicant requests reinstatement of the process by the board.

- The definition of "temporary impacts" was discussed. The concept is to make the definitions consistent with the Code. A technical correction was suggested to make the definition consistent with the Corps definition. It was suggested that the phrase "with topsoil from the impact area" be included in the definition. It was suggested that the phrase "previous wetland acreage or functions" be revised to "previous wetland acreage and functions. A suggestion was made to delete the word "function" in this instance since you would not be getting the "function" back". It was argued that there was no time frame and the concept is that ultimately the function would be restored. The suggested rewrite of the definition reads:

"Temporary impacts" means impacts to wetlands or other surface waters that do not cause a permanent alteration of the physical, chemical, or biological properties of surface waters or the permanent alteration or degradation of existing wetland acreage and functions. Temporary impacts include activities in which the impact area is restored to its preconstruction contours with topsoil from the impact area and elevations, such that previous wetland acreage and functions or surface water functions are restored.

- The definition of "undesirable plant species" was discussed. It was noted that one of the major problems on some mitigation sites is trying to dwell into what is an "undesirable plant species" and does it really truly matter whether it is being found on a site or not. In a majority of instances the project sites may be immediately adjacent to other sites that already have these "undesirable plant species" in evidence and are probable there to stay. *Staff Response: The operative thing in the definition is the "success criteria".*
- A technical correction to the definition of "undesirable species" was suggested to account for the presence of some species that colonize a site that are in fact desirable. It was suggested that the definition of "undesirable plant species" be revised to read:

"Undesirable plant species" means any species that invades, naturally colonizes, or otherwise dominates a compensatory mitigation site or mitigation bank <u>if it causes or contributes</u> to the failure of the vegetative success criteria for a particular compensatory mitigation site or mitigation bank.

ACTION ITEM: Staff will review the proposed changes to the definitions and incorporate changes where possible to accommodate the concerns and suggestions made by the advisory group during today's meeting and those submitted by the group prior to today's meeting.

- Concerns were raised over the impact of the actions related to moving outside of the scope of the NOIRA during this process. What is allowed under the NOIRA for this regulatory process? *State Response: The NOIRA for this process includes the following:*

The purpose of this proposed regulatory action is to change the overall organization of the regulation such that it may be more reader-friendly; to incorporate policies and guidance developed in recent years; to incorporate certain federal regulatory provisions relative to the program; and to clarify and correct grammar, spelling, references, and errors. Other amendments to the regulation may be considered by the Board based on comments received in response to the NOIRA or discussions of the regulatory advisory panel (RAP).

The following proposed revisions, clarifications, and additions to this regulation are being considered and include, but may not be limited to, language, information, and provisions pertaining to surface water withdrawals, as regulated under the program, as well as program policy and guidance developed in recent years:

1. Change the overall organization of the regulation: revising the order in which information is provided; moving existing information to new locations, in whole or in part; adding new sections to expand or clarify existing provisions or incorporate new provisions; deleting sections, in whole or in part, to remove obsolete information and duplication; revising references and/or citations made in the regulation; and correcting sentence structure, grammar, spelling, and typographical errors.
2. Revise, clarify, move, add, and/or delete definitions.
3. Revise, clarify, add, and/or delete the activities that require application for a permit and those activities that are excluded from the need to obtain a permit, including activities in specific water sources.
4. Revise and/or clarify the application process: extension of an optional pre-application process for all types of projects; the list of administrative and technical information required to achieve a complete permit application, such as applicant contact information, information specific to certain types of activities or to certain types of state waters, compensation plans including avoidance and minimization efforts, monitoring and reporting; the provisions for application review suspension and application withdrawal; and required drawings, diagrams, and maps.
5. Revise and/or clarify the compensatory mitigation requirements, such as the sequencing of acceptable compensatory mitigation actions and compensatory mitigation provisions; the requirements necessary for mitigation banks and in-lieu fee funds to become operational; the requirements for compensating impacts to open waters; and/or compensation necessary for temporary impacts.

6. Revise and/or clarify the process, informational requirements, and/or provisions for permit actions that occur after initial permit issuance, such as modification of permits and permit authorizations, continuation of coverage for general permit authorizations, reissuance of permits and Section 401 certifications, permit and permit authorization revocation, termination, and variance, and/or permit transitioning.
7. Revise, clarify, add, and/or delete VWP general permit authorization provisions as necessary to accommodate those revisions made to each of the existing VWP general permit regulations.

- The process for consideration of proposed revisions was discussed. It was suggested that going through it page-by-page, even though a lengthy process was probably necessary. The process needs to be done at the table with the Advisory Group members participating to be worthwhile. It is very beneficial to hear the discussions related to the proposed revisions.

7. Review of Draft 9VAC25-210-45 (Brenda Winn):

Brenda Winn reviewed the proposed changes to 9VAC25-210-45.

8. Review of Draft 9VAC25-210-50 (Brenda Winn):

Brenda Winn reviewed the proposed changes to 9VAC25-210-50.

Group Discussions included the following:

- The change of "surface waters" to "state waters" was discussed. It was suggested that in this instance that the term "surface waters" might be more appropriate. *Staff Response: This phrase in Code refers to "state waters" and we are trying to be consistent with the Code. The phrase in Code is "otherwise alter the physical, chemical, or biological properties of state waters".*

The Code reference is 62.1-44.15:20 A 3:

"3. Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board."

- The question is whether the shift of this term is in direct conflict with "groundwater" in other areas of the regulations?

ACTION ITEM: Staff will revisit the shift of the terms from "state waters" to "surface waters" and the possible need to clarify the statement contained in this section so that the regulation of "groundwater" is not included or implied in this section.

9. Review of Draft 9VAC25-210-55 (Brenda Winn):

Brenda Winn reviewed the proposed changes to 9VAC25-210-55. These are the new requirements related to "statewide information requirements".

Group Discussions included the following:

- It was noted that the Code language related to this requirement reads "other pertinent information" not "any pertinent information". It was suggested that the requirement should be rewritten to read:

The board may request, and any owner shall provide if requested, plans, specs, and other pertinent information as may be necessary to determine the effect of his discharge on the quality of state waters, or such other information as may be necessary to accomplish the purposes of this chapter.

- It was suggested that this needs to be consistent with terminology used in the Code. It was suggested that a specific Code reference should also be provided for this requirement.(62.1-44.21):

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§ 62.1-44.21. Information to be furnished to Board.

The Board may require every owner to furnish when requested such plans, specifications, and other pertinent information as may be necessary to determine the effect of the wastes from his discharge on the quality of state waters, or such other information as may be necessary to accomplish the purposes of this chapter. The Board shall not at any time disclose to any person other than appropriate officials of the Environmental Protection Agency pursuant to the requirements of the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500) any secret formulae, secret processes, or secret methods other than effluent data used by any owner or under that owner's direction.

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10. Review of Draft 9VAC25-210-60 (Brenda Winn):

Brenda Winn reviewed the proposed changes to 9VAC25-210-60.

Group Discussions included the following:

- A suggestion was made to include a reference to "traps" in 9VAC25-210-60 7. The suggested revision would read:

7. Flooding or back-flooding impacts to surface waters resulting from the construction of temporary sedimentation basins or traps on a construction site, when such structures are necessary for erosion and sediment control or stormwater management purposes.

11. BREAK – LUNCH – 12:00 – 1:00

12. Review of Draft 9VAC25-210-65 – Administrative continuance. (Brenda Winn):

Brenda Winn reviewed the proposed changes to 9VAC25-210-60.

- A couple of comments had been received on this section.
- The concept of "timeliness" incorporated into this section addresses the timely application from the very beginning of the process not just from the time of continuance. "Timely" refers to when you first put in your application.
- The concept of "timely" and the identification of "days" may be moved closer to the beginning part of the section to clarify the requirements.
- Comments had been received related to the length of the time frames provided for in this section and that they were too long, but if you consider that they apply from when you first put in your application not just when you are looking at continuance then they shouldn't seem too long.
- The references in this section related to general permits may be moved out of this section and placed in the specific general permit regulations.
- The confusion is that we put the word "timely" in the first sentence of this section. This generated a lot of discussion of what "timely" meant which drove us to a lot of "other stuff".

Group Discussions included the following:

- A question was raised over the sentence that reads: "Timely application shall be a minimum of 75 days for an authorization of general permit coverage…" *Staff Response: That is allowing staff enough time to review the application.* The question is "75 days prior to what?" *Staff Response: This is before expiration of the permit. This is only for the reissuance of permits.* If this is for a reissuance then it shouldn't take but a minute or two to review it, you have already approved so just approve it, why do you need 75 days? *Staff Response: For the general permit part of this staff would only reissue when the regulation is reissued in 2026. So if you are submitting before the reg is reissued to get a new permit (in 10 years), staff would need to reevaluate your application to make sure that it complies with the new regulation requirements.*
- A concern was raised over even having the concept of "administrative continuance" included in the regulation. It was suggested that having this option is not helpful to the program. An example of the "administrative continuance" process in the MS4 permits was given where permits were continued that were no longer effective or efficient and permits continued to be enforced almost a decade after they should have expired. This is not a healthy practice for a robust program to consider. A strong opposition to the concept of including an "administrative continuance" mechanism was noted. *Staff Response: Don't know how it is fair to have the concept of "administrative continuance" in other DEQ permits and not to include it in this one. We do have as a matter of law "administrative continuance" in our permits. Don't know why this one would be called out differently. Even if a permit is administrative continued until*

reissuance the applicant still has to comply with any new requirements when that reissued permit becomes effective. There is a way to make it comply with the new requirements. That decision is made when you look at the laws and regulations in place at the time you are reissuing the permit.

- A concern was noted that it would not be a good idea to build into the program the concept that a general permit could be continued for an indefinite period of time.
- It was suggested that there is a need for an administrative continuance.
- It was suggested that the proposed time lines were too long – 40 to 60 days should be sufficient for a general permit.
- The group discussed the concept of a "complete" application. *Staff Response: It was noted that even though a list of what constitutes a "complete application" is identified that 70% of the applications that are received are "incomplete".*
- It was suggested that the 75 days that are proposed gives DEQ time to review the application and gives someone who thinks they have a complete application and doesn't ample time (15 days) to get the materials back into DEQ and not create a crisis situation and gives DEQ time to evaluate the application. If the timeline is any shorter there may be an impression that the application is being ram-rodded through the system to get an outcome.
- It was noted that the Building Industry was not looking for a 10 year permit, a permit term for the general permits of 5 to 7 years would be adequate for the building industry. It was noted that there would be less concern from some if the permit was for a 5 year term. It was suggested that DEQ might want to consider using a 5 or 7 year permit term. *Staff Response: The group is talking about the general permit term of 5 to 7 years versus 10 years and an authorization term of 15 years. The current proposal is for the general permit to have a term of 10 years based on the term of the regulation so if an applicant comes into the cycle late then the general permit may be for substantially less than 10 years.*
- The building industry wants to have a guaranteed permit term no matter when they start the process. They would always like to have a set amount of time from the date that the permit is issued. *Staff Response: If we were to go with a 5 year permit then we are back doing this regulatory development process in 3 years. We would have to be reconvening the advisory group to reissue the general permit on a very frequent basis with a 5 year general permit term. If it is the sense of the group that we should have a 5 year permit then we need to know that.*
- It was suggested that having a 5 year permit would be a much more appropriate approach and framework.
- What the building industry is looking at is that no matter when they would get a 5 to 7 year permit that they would have that 5 to 7 years to do that work. They would always prefer to have the same set amount of time no matter when they got their permit. *Staff Response: The permit only has a 10 year term. When you get 2 years from the expiration date then we can only issue a 2 year permit.* The regulations that govern that permit are only active for that 10 year period. *The permit is adopted as a regulation that has a term and that term is finite. We can choose anything up to 15 years as the term of that regulation.*

- It was suggested that DEQ could have the regulation last 15 years and then within that period provide for 5 year permits or 7 year permits that would always be that long. Say with a 5 year permit, before 10 years are up you could issue a new regulation to set that 15 year outside span another 15 years. *Staff Response: That would require DEQ to amend and get rid of the underlying regulation.* What the building industry wants is what they have now – permits for a given set term no matter where they fall in the regulation time frame. *Staff Response: A permit cannot be extended past the expiration date of the regulation.*
- The group discussed the implications of a permit term and the expiration date of the regulation and the legal requirements and implications.
- A question was raised over the results of the group's conversations back in October and whether there was any additional information that needed to be shared with the group regarding the time frame questions.
- Could we make the underlying regulations for a 15 year term and just plan on reopening the regulation at 10 years to provide this "guaranteed" permit term? This was discussed at the October meeting of the Advisory Group. *Staff Response: There may be some legal implications associated with that approach. Staff went back through the conversations and recommendations of the group and DEQ's legal authorities and even if we had a 15 year permit with 3 5 year authorizations, if you came in for a permit in year 14 all you would get is a 1 year permit – there is no way past that.*
- At the end of the conversation in October the conversation was that the problem with a reopener of the permit at a 10 year time frame is that you would end up having two different general permits existing at the same time. Why is that not possible to reopen the permit at 10 year interval? An explanation of why that concept is not possible was requested.
- What is the purpose behind the proposed language in 9VAC25-210-65? *Staff Response: If we are doing this process and for whatever reason DEQ cannot get to the final approval process then the permit could be administratively continued (government shutdowns; layoffs; budget constraints; etc.). Those people that have the authorizations won't have the "rug pulled out from under them" because of an issue on DEQ's part. What we are trying to do is put into this regulation what is already provided for and allowed for under the Code.*
- *Staff Note: Administrative continuance gives a permittee the ability to keep operating under existing permit conditions because their permit hasn't been issued through no fault of their own. This is to deal with those instances where the state has not met its obligations.*
- *Staff Note: You cannot extent the term of a general permit without going through a regulatory process.*

13. Review of Draft 9VAC25-210-70 – Effect of a VWP permit. (Brenda Winn):

Brenda Winn noted that there are no proposed changes to 9VAC25-210-70.

14. Review of Draft 9VAC25-210-75 – Preapplication... (Brenda Winn):

Brenda Winn noted that this text had been moved to Part V and revised.

15. Review of Draft 9VAC25-210-80 – Application for a VWP permit. (Brenda Winn):

Brenda Winn reviewed the proposed changes to 9VAC25-210-80.

- In 9VAC25-210-80 B there has been some moving around of existing language in this section.

Group Discussions included the following:

- A suggestion was made to delete the last sentence of 9VAC25-210-80 B – "The board may request additional information as needed to evaluate compliance with this chapter." This statement is too open-ended. It would be better for DEQ to just identify what they want. Just provide a complete list of what you want. Don't like the idea of open-ended information requests.
- The whole idea was to streamline the process.
- Earlier today, the group looked at 9VAC25-210-55 related to Statewide Information requirements. If that section is universally applicable then why would this sentence regarding requesting additional information be needed here?

ACTION ITEM: Staff will look at the deletion of the sentence in 9VAC25-210-80 B – "The board may request additional information as needed to evaluate compliance with this chapter" since it is already addressed in 9VAC25-210-55. Staff will look at the other option of deleting the proposed addition in 9VAC25-210-55 since it appears that this additional information request provision is already present in the existing regulation, it has just been moved.

- A question was raised about 9VAC25-210-80 B 1 d and the concepts of a "proposed development and construction schedule". What is meant by the term "development schedule"? *Staff Response: This concept was discussed during a previous meeting. There is a period of time with zoning; financing; subdivision planning; advertising and all kinds of other things that have to be addressed prior to turning the first shovel of dirt – that would be included in a development schedule.*
- A concern was raised regarding the language related to shapefiles contained in 9VAC25-210-80 B 1 e (6). A suggestion was made to insert the phrase "if available" to clarify those instances where the requested information is just not available. It was suggested that "if available" is inserted that the last sentence of the section could be deleted. There was no consensus about this change.
- It was suggested that instead of trying to broaden the wording here that the concerns related to VDOT be addressed in guidance and through a new and revised MOU with VDOT. *Staff*

Response: DEQ has a MOU with VDOT that has to be revisited from time to time, this issue regarding availability of GIS-compatible shapefiles and other VDOT specific concerns could be addressed through that mechanism.

ACTION ITEM: DEQ will revisit their MOU with VDOT to attempt to address the VDOT specific concerns that have been raised during this regulatory process.

- A concern was raised regarding the wording in **9VAC25-210-80 B 1 g**. The last sentence of that subsection appears to be really broad. The statement "…shall demonstrate to the satisfaction of the board…" is a very broad statement. *Staff Response: This wording already exists in the current regulation and has been moved and revised.*
- The group discussed the concept of "least environmentally damaging practicable alternative".
- This reflects the current process being followed by the board and DEQ.
- **9VAC25-210-80 B 1 h (1):** A request was made to revise the text to read: *"(1) Wetland impacts identified according to their Cowardin classification; and for each classification, the individual impacts quantified in square feet to the nearest whole number, cumulatively summed in square feet, and then the sum converted to acres and rounded to two decimal places using commonly accepted arithmetic principles of rounding."*
- **9VAC25-210-80 B 1 h (2):** A concern was noted over the wording of this requirement. *Staff Response: The reference should be clearly tied to the Unified Stream Methodology not "when compensatory mitigation is required". There will need to be some wordsmithing to clarify this requirement.*

ACTION ITEM: Staff will revisit the proposed language in 9VAC25-210-80 B 2 h (2) to clarify that the reference is related to use of the Unified Stream Methodology not the requirement for compensatory mitigation.

- **9VAC25-210-80 B 1 h (3):** A request was made to revise the text to read: *"(3) Open water impacts identified according to type; and for each type, the individual impacts quantified in square feet to the nearest whole number, cumulatively summed in square feet, and then the sum converted to acres and rounded to two decimal places using commonly accepted arithmetic principles of rounding."*
- **9VAC25-210-80 B 1 h (5):** A reference to DEQ guidance is identified – which guidance would that be? *Staff Response: That is guidance to be written – the statute gives DEQ the ability to come up with its own delineation practices and then be able to write the guidance related to those practices. That guidance has not been written, because we decided it wasn't a smart idea to have a different delineation method other that the Corps Manual.* The other DEQ guidance that is needed is on what is meant and required for a "GIS-compatible shapefile".
- **9VAC25-210-80 B 1 h (5):** There is a reference to "delineated and approved surface water boundaries" as a component of the delineation map. It was suggested that you may or may not have that "approval" at the complete application stage. A suggestion was made to delete the term "approved" in this subsection. It was suggested that "preliminary" may be as good as it

gets. This may be another item for consideration for addressing during the review of the VDOT MOU. Sometimes there is a time lag with getting Corps approval and delineation. VDOT noted that in a majority of their cases they do not get a final jurisdictional determination – only a preliminary one. It was suggested that the text and wording in 9VAC25-210-80 B 1 h (5) needs to follow that used in 9VAC25-210-80 B 1 h (4). Preliminary is as good as it gets. This is the form in which the Corps provides it approval.

- **9VAC25-210-80 B 1 h (5):** The use of the term "describes" was discussed. It was suggested that since this is a delineation map that you really are not describing anything – you are depicting it. The suggestion was made to replace the term "describes" with "depicts" in this subsection. The other possibilities suggested were the use of the terms "identifying" or "labeling" instead of "describing".
- **9VAC25-210-80 B 1 i (1):** The insertion of the words "topographic and bathymetric" between "proposed" and "contours" was suggested. It was recommended that the phrase "if available" be added after the word "contours". *Staff Response: This is probable better handled in the revisit to the VDOT MOU rather than with the insertion of the phrase "if available" here.*
- **9VAC25-210-80 B 1 i (4):** The insertion of the phrase "and tidal wetlands boundaries in tidal areas" was proposed following the phrase "ordinary high water mark in nontidal wetlands". A question was raised as to whether the "Cowardin classification" was needed. *Staff Response: It provides useful information to the staff. This information can be provided through shading or cross-hatching.*
- **9VAC25-210-80 B 1 i (5):** A suggestion was made to insert the phrase "the proposed activity is" following the word "unless". A concern was noted with this requirement related to whether the requirement is for a "field verified RPA" or an "approved RPA"; which RPA is required? It was suggested that the term "approved" should be inserted following the phrase "The limits of any" to clarify this requirement. Or the alternative could be "field verified or approved RPA, whichever is available. The group discussed the pros and cons of this requirement and the uses for the information provided by such a depiction on the map. The group agreed that the phrase should be "field verified and approved RPA, if available".
- **9VAC25-210-80 B 1 j:** A suggestion was made to revise the first sentence to read: "Cross-sectional and profile drawings:" in order to clarify that both are discussed in this section. It was suggested that the wording revisions in 9VAC25-210-80-B 1 i (4) should be included here, i.e., the insertion of the phrase "tidal wetlands boundaries in tidal areas" after the phrase "ordinary high water mark in nontidal areas." The designation of a "minimum of 50 feet beyond the limits of the proposed impact" was suggested as being excessive. A recommendation was made to change that limit to "10 feet". A question was raised about the requirement for a "longitudinal profile". It was noted that this is already required in the regulations.
- **9VAC24-210-80 B 1 k:** The use of the term "dredged material" was discussed. It was noted that some think of that as dredging from a lake or a pond and others might consider it to be any excavation from upland areas. Which is being referred to here? The Corps definition is that if you excavate anything from an "upland" it is dredged material. The normal use is that material

comes from a water body. The interpretation used makes a big difference in getting materials certification. Typically from a farm upland area people aren't checking every bit of material whereas with "dredging" they tend to collect "bad" things they test the material on a more ongoing basis. It was noted that the practice has always been "dredged from a water body". *Staff Response: The definition in the regulation is dredged material is material that is excavated or dredged from surface waters.* A suggestion was made to include reference to "open water and stream bed" to this section: *"...dredged material from on-site open water areas and stream channels is involved..."* The group discussed the concept of "dredging" and standard practice relating it to "open water". It was suggested that this is a permit condition so do we really need to include this as an application requirement? *Staff Response: Staff will consider just addressing this as a permit condition instead of an application requirement.*

ACTION ITEM: Staff will review whether this materials assessment requirement is more appropriate to be addressed in the permit conditions instead of as an application requirement.

- **9VAC24-210-80 B 1 m (1):** A suggestion was made to insert the Phrase "for wetland impacts" in 9VAC25-210-80 B 1 m (1) as a technical clarification: <u>(1) If permittee-responsible mitigation is proposed **for wetlands impacts**, a conceptual wetland compensatory mitigation plan must be submitted in order for an application to be deemed complete and shall include at a minimum: the goals…</u>
- **9VAC24-210-80 B 1 m (2):** A suggestion was made to insert the Phrase "for wetland impacts" in 9VAC25-210-80 B 1 m (2) as a technical clarification: <u>(2) If permittee-responsible mitigation is proposed **for stream impacts**, a conceptual stream compensatory mitigation plan must be submitted in order for an application to be deemed complete, and shall include at a minimum: the goals</u>…
- A concern was raised regarding a missing section to address "open waters". It was suggested that there be a section added to address compensation for open water impacts. It was suggested that this should be discretionary. There was disagreement regarding the inclusion of language related to the inclusion of language related to "open waters". It was suggested that it could be noted "as required". *Staff Response: 9VAC25-210-116 C 4 includes the following: 4. <u>Compensatory mitigation for open water impacts may be required to protect state waters and fish and wildlife resources from significant impairment, as appropriate.</u>* The group discussed the concept of having a limit for any required "compensation for open water impacts". Apparently there is a difference in the compensation requirements from different agencies and under different circumstances.
- **9VAC24-210-80 B 1 m (3):** A question was raised related to the Virginia Conservation Easement Act: Are there other historic easements that would still be valid? Are there grandfathered easements that are still valid that would not meet the requirements of the Virginia Conservation Easement Act? *Staff Response: This language comes from the "banking instrument" – unsure about grandfathered easements.*

- **9VAC25-210-80 B 1 m (4):** It was noted that during a previous meeting the decision had been made to eliminate the requirements identified as B 1 (m) (4) (a); (c); and (d). *Staff Response: A review of the notes from previous meetings didn't suggest that as an outcome of the discussions.* A recommendation was made to do just that so that the "banking" market process could be allowed to just do its thing. The suggested rewording would be: (4) Any compensatory mitigation plan proposing the purchase or use of mitigation bank or in-lieu fee program credits shall include the number and type of credits proposed to be purchased or used. A question was raised as to whether DEQ would base its approval on a specific mitigation bank that is being proposed? *Staff Response: As long as it is an approved bank, DEQ doesn't really care. What is important is that it is an "approved" bank and that there are approved credits available for purchase.* A suggestion was made to further edit the section by revising the wording to read: "(4) Any compensatory mitigation plan proposing the purchase or use of mitigation bank or in-lieu fee program credits shall include: (a) The number and type of credits proposed to be purchased or used; and (b) Documentation from the approved bank or in-lieu fee program sponsor of the availability of credits at the time of application." The group discussed the concept of "resale of credits" and the prohibition of resale of credits. The inability to resale credits purchased for the King William Reservoir project was discussed. The concept of "due diligence" was discussed. The idea of inclusion of the "price of the credits" as a requirement was discussed.

ACTION ITEM: Staff will need to revisit this language and advisory groups concerns and recommendations.

- **9VAC25-210-80 B 1 n:** A suggestion was made to replace the term "use" with the term "activity" in the requirements related to the Chesapeake Bay Resource Protection Areas (RPAs). The suggested wording would be: "…Such description and a graphical depiction shall include the nature of the prohibited activities within the protected areas and the limits of any Chesapeake Bay Resource Protection Areas (RPAs), unless the proposed impact(s) is an exempt activity under the Chesapeake Bay Preservation Act (§ 62.1-44.15:72), as additional state or local requirements…" *Staff Response: Staff will check on the actual language used related to the Chesapeake Bay Preservation Act.*
- **9VAC25-210-80 B 1 p:** A suggestion was made to allow the use of electronic signatures on the signature page. Many agencies and staff want no paper or less paper. Electronic signatures work for most major financial transactions. It was noted that you can buy a house now without an original signature. A question was raised as to whether there is a state requirement for an original signature? A recommendation was made to delete the sentence that reads: "*The application signature page, either on the copy submitted to VMRC or to DEQ, must have an original signature.*" The revised requirement would read: "p. Signature page that has been signed and dated by the applicant. If the applicant is a business or other organization, the signature must be made by an individual with the authority to bind the business or organization, and the title of the signatory must be provided. Electronic submittals containing the original-signature page, such as that contained in a scanned document file, are acceptable."

ACTION ITEM: Staff will check to see if there is a rule or requirement for an original signature on the signature page.

- **9VAC25-210-80 B 1 q:** A concern was noted over the possible exclusion of an originally proposed edit. The sentence that seems to be missing referred to "The board will continue to process the application, but the fee must be received prior to the release of the draft VWP permit." Was there a reason for the deletion of that sentence? *Staff Response: Staff just wanted to make it consistent with what was being proposed in the General Permits. The intent was to strike that original language and replace it with the sentence: "The applicant will be notified by the board as to the appropriate fee for the project."* The group discussed the "permit application fee" language and suggested that staff consider including the original proposed language for the Individual Permit requirements.

ACTION ITEM: Staff will review this requirement and the proposal to leave the original language related to "permit application fee".

16. **BREAK – 3:00 – 3:10:**

17. **Continued Review of Draft 9VAC25-210-80 – Application for a VWP permit. (Brenda Winn):**

Brenda continued through the proposed revisions to 9VAC25-210-80. She started the discussions at 9VAC25-210-80 C which has been revised to insert the "functional assessment" language.

Group Discussions included the following:

- **9VAC25-210-80 C:** A concern was raised that for many purposes and not just for setting compensatory mitigation, it is important that a functional assessment should be submitted to the agency at the time of application, it should not be discretionary. A objection was raised as to having it be "discretionary". Another concern was noted that there needed to be clarity as to when a functional assessment would be required and what benefit it would provide if it is required and under what circumstances. *Staff Response: The proposed language explains when a functional assessment would be required.* The specific requirements for when a functional assessment would be required were discussed. A concern was noted that it appeared now to be a cumulative situation as far as amount of impacts. This should be for significant wetland impacts at a particular location instead of it being a cumulative situation. A question was raised as to when a functional assessment would be required and that the proposed language was confusing as currently structured. The proposed language says that a functional assessment is required if wetland impacts total 1.01 acres or more and then when one of these situations outlined in "2 a" and "2 b" present itself. Just proposing compensatory mitigation as part of permittee-responsible mitigation should not in and of itself shouldn't automatically require a functional

assessment. A recommendation was made to move the proposed language in "2 a" up into "1 a". It was suggested that the language be revised to require a functional assessment only when you are going above the tried and true methods or methods outside of the normal/standard mitigation ratios – straight ratios. It was suggested that "out-of-kind" mitigation over and above the normal should also be included in the proposed "2 b". *Staff Response: Not all applicants have a staff of wetland scientist nor do they hire professional wetland scientists. So in this day and time when there are bank credits that are plentiful, at least in some watersheds, there are still people who don't want to pay the price for mitigation bank credits. And we want to look at things harder and closer to make sure that an applicant knows what they are doing on a site related to permittee-responsible mitigation.* Would conducting a functional assessment truly give DEQ that answer? *Staff Response: Not in all cases, but in many cases yes.* Are there any better options for ensuring that appropriate compensation would be made in these situations? Even if a "functional assessment" is an imperfect tool, it is still a tool. It was suggested that the mitigation plan should have enough detail and enough information in it for DEQ to be able to say that the plan makes sense or no this isn't quite up to par yet, there are outstanding questions that need to be addressed, etc. to make sure it is a viable option. The benefits of a functional assessment were discussed by the group. *Staff Response: Having this information through a functional assessment is going to reduce the negotiations and give you something harder and firmer – some people will like this approach – some will not.* A concern was reiterated over the requirement for a functional assessment.

- **9VAC25-210-80 D – Additional information:** Is this needed if the new 9VAC25-210-55 is included related to additional information?
- **9VAC25-210-80 F – Incomplete application:** A suggestion was made to change the word "where" with "when" in the first paragraph.

18. Review of Draft 9VAC25-210. (Brenda Winn):

Brenda Winn reviewed the proposed changes to 9VAC25-210-90; 9VAC250210-100; 9VAC25-210-110; & 9VAC25-210-115.

19. Review of Draft 9VAC25-210-116 – Compensation. (Brenda Winn):

Brenda Winn reviewed the proposed changes to 9VAC25-210-116.

Group Discussions included the following:

- **9VAC25-210-116 B 1:** A recommendation was made to revise "B 1" to include the phrase: "if such credits are available in sufficient quantity for the project at the time projected time of need."

- **9VAC25-210-116 B 2:** A recommendation was made to include reference to the "Virginia Open Spaces Lands Act" in addition to reference to the Virginia Conservation Easement Act". It was recommended that this should also be included in the previous section that contained this requirement (9VAC25-210-80 B m (3)). The revised wording would read: "…in accordance with the Virginia Conservation Easement Act and or the Virginia Open Spaces Lands Act…"
- **9VAC25-210-116 B 2:** A recommendation was made to change the word "protection" to "protective" in the last sentence before 9VAC25-210-116 B 2 a for consistence. The revised wording would read: "…The protective mechanism shall include:"
- **9VAC25-210-116 B 2 c:** It was noted that the term "long term" should be hyphenated because it is an adjective. The revised text would read: "c. a long-term management plan…"
- **9VAC25-210-116 C "2 a" and "2 b":** A recommendation was made to revise the proposed language and use the version of the requirements that was discussed by the advisory group at their September 9th meeting. At that meeting the discussion was to revise the text to read:

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2. Compensatory mitigation for unavoidable wetland impacts may be met through the following options…

   a. Purchase or use of wetland credits from a mitigation bank, pursuant to § 62.1-44.15:23 of the Code of Virginia or DEQ approved in-lieu fee released credits;

   b. Purchase of in-lieu fee advance credits…

- **9VAC25-210-116 C "2 a" and "2 b":** It was noted that if the goal is to be consistent with the federal rule that putting the text in "2 a" and "2 b" back to the September 9th language isn't entirely consistent with the federal rule. By putting "released funds" with "2 a" then you take out the District Engineer which is in this case, is DEQ's discretion. It is a hierarchy that applies all the time unless there are released credits. If there are released credits then there is an exception where DEQ applies their discretion. You would be writing that out of the rule if you make this change. It was noted by TNC that if their credits are released then DEQ has already approved them, so they are in the ground, they are meeting success criteria, and both the Corps and DEQ have approved them as successful. So in some cases they may be more reliable and factual then bank credits that might be from their initial release. TNC would content that they are equivalent. *Staff Response: If the intent is to be consistent with the federal rule then the wording suggested by staff is the appropriate language to use. The federal rule does give discretion to the District Engineer. The proposal is the sequence from the federal rule.* The recommendation was restated to revert the language back to that proposed at the September 9th meeting and to add the phrase with District Engineer discretion. The group discussed the hierarchy and the basis for the decisions. It was suggested that DEQ may be making it harder on the permittee with the proposed change. *Staff Response: The language should be in compliance with the federal rule.* A recommendation was made to get input from the Corps on this language and to keep the comments from TNC in mind in the development of the "final" language for these requirements.

ACTION ITEM: Staff will take into consideration comments from the advisory group related to compensation mitigation hierarchy language and TNC's comments and concerns and will seek input from the Corps on the proposed language.

- It was noted that the NOIRA for this regulatory action stated that changes were being proposed to make the regulation consistent with current practice and the federal rule. It appears now that more substantive changes are being proposed. The preference is to be consistent with the federal rule.
- It was noted that there is no discussion of "enhancement of wetlands". Does the concept need to be addressed in the list in 9VAC25-116 C 2?

ACTION ITEM: Staff will look at the language in the statute and consider the inclusion of the concept of "enhancement".

- **9VAC25-210-116 C 3:** The same comments made for the hierarchy proposed in 9VAC25-210-116 C 2 apply to 9VAC25-210-116 C 3.
- **9VAC25-210-116 D 4:** It was suggested that the proposed change from five years to 10 years for length of approval doesn't seem long enough. It was suggested that it should be 20 years. A typical project has 10 years of maintenance and monitoring requirements. It should be longer than the monitoring period. It was also noted that the change from five to 10 might have been too aggressive a proposed change. The group discussed the pros and cons of making this revision. It was noted that it didn't make sense to have an approval less than the duration of the project. It was suggested that this periodic approval requirement provides an opportunity for scrutiny. *Staff Response: Staff is getting an annual opportunity for review of the projects through the annual fund reports. The wording is for "up to" – it is a maximum cap.*
- **9VAC25-210-116 E:** The group discussed the concept of "multi-project mitigation sites". A question was raised over the presence of VDOT legacy projects. Is there anybody other than VDOT that has "legacy sites" that need to be considered? *Staff Response: Yes, there are other entities other than VDOT on the legacy sites list.* The group discussed the identification of legacy sites and the use of multi-project mitigation sites. It was suggested that if the option for the use of multi-project mitigation sites is going to be considered and included here then it needs to be identified as an option in the previous hierarchy list. *Staff Response: Perhaps it could be eliminated and just dealt with in the VDOT MOU and include it as a permittee-responsible practice.* VDOT noted that there may be other entities that might also be out there that might want to have the option for a multi-project mitigation site.

20. Review of Draft 9VAC25-210-180 – Rules for modification, revocation and reissuance, extension, transfer, and termination of VWP individual permits. (Brenda Winn):

Brenda Winn reviewed the proposed changes to 9VAC25-210-180.

Group Discussions included the following:

- **9VAC25-210-180 B 4:** A question was raised over the deletion of the "acts of God" language. Is this covered somewhere else. Can the language be retained? *Staff Response: The way the original modification section was drafted it seemed to be that only when there were acts of God could you get a modification and that just didn't seem reasonable so the decision was made to delete the reference, so that other things outside of "acts of God" could be considered. It was thought that the revised language in 9VAC25-210-180 B 1 provided an opportunity to consider "acts of God".*
- **9VAC25-210-180 E 5:** A suggestion was made to revise the text to add the phrase "or uses". The revised text would read: "5. Change project plans or uses that do not result…"
- **9VAC25-210-180 E 6:** A question was raised as to whether DEQ would allow credits to be resold? The issue with the credits for King William reservoir were discussed. The resale of credits should be an allowed practice.
- **9VAC25-210-180 E 7:** A question was raised over the requirements for a minor modification. It was suggested that the allowed limits provided a large amount of impacts that could be addressed through a minor modification process, which would not allow for public scrutiny. It was suggested that the proposed limits were too high. There is a need for public scrutiny.
- **9VAC25-210-180 E 7 a:** A recommendation was made to revise 9VAC25-210-180 E 7 a by the addition of the phrase: "or be required for relevant offsite work". This is needed because of permit requirements or needed changes to a site plan required by other governmental agencies. The revised text would read: "a. Proposed impacts are located within the project boundary as depicted in the original application or be required for relevant offsite work." A question was raised as to whether the proposed language could be further refined to make reference to requirements by other governmental agencies? It was noted that this could also be a private developer that had an additional stipulation or requirement. The language could include a reference to "directly related offsite work". *Staff Response: Maybe the language could be "as required by another governmental agency".*

ACTION ITEM: Staff will look at the proposed language to address the possibility of "relevant offsite work" and "required by another governmental agency".

- **9VAC25-210-180 E 7 c i:** The group discussed the limitation of 100 linear feet.
- **9VAC25-210-180 E 7 f:** A concern that the 15 day response time provided is a bit much. This is too long a time to be waiting for approval for temporary impacts. A time limit of 5 days was suggested. It was noted that DEQ needs to approve the temporary impacts and it should not be allowed just because of the passage of time. DEQ needs to say that it is okay. *Staff Response: There is no time frame identified in the current regulation but 15 days tracks with the complete application determination time frame.*

ACTION ITEM: Staff will need to reconsider the proposed limits and the concerns noted during the advisory group meeting.

- **9VAC25-210-180 E 8:** It was suggested that the phrase "or a DEQ approved in-lieu fee program" should be added to 9VAC25-210-180 E 8. The revised language would read: "8. Substitute a specific, approved, mitigation bank(s) or a DEQ approved in-lieu fee program with another approved mitigation bank or a DEQ approved in-lieu fee program, or substitute all or a portion…"
- **9VAC25-210-180 E 9:** A suggestion was made to change the "180 day" period to "30 days" in the sentence that reads: "The permittee must file the request 180 days prior to the expiration date of the VWP permit." *Staff Response: How about "90 days"?* Better than 180. Is this time frame tied to the statute? *Staff Response: Staff was trying to figure out what the typical time period might be under a minor modification. This is consistent with current practice.* If this is just an "extension" then it should be reduced.

ACTION ITEM: Staff will revisit the proposed time frame for request for the extension date of the VWP permit.

21. Review of Draft 9VAC25-210-220 – Waiver of VWP permit or §401 certification. (Brenda Winn):

Brenda Winn reviewed the proposed changes to 9VAC25-210-220.

Group Discussions included the following:

- **9VAC25-210-220 A:** A question was raised over the use of the phrase "to the satisfaction of the board". Previously the statement "upon the request of the board" had been used in similar language elsewhere in the regulation.

ACTION ITEM: Staff will check the language in 9VAC25-210-220 A for consistent language with other usage in the regulation.

22. Public Comment (Bill Norris):

Bill Norris asked for Public Comment. One public comment was provided:

- **James Parker – Virginia Mitigation Banking Association:** Regarding resale of credits: Mitigation banking instruments prohibit the resale of credits – some actual purchase and sale agreements prohibit the resale of credits. The resale of credits would create a liability factor for the bankers. The resale of credits would open up a "can of worms" for the public record. The mitigation banks are not allowed under the current mitigation banking mechanism to resale credits. The Mitigation Banking Instruments would need to be modified to allow for the resale of credits.

23. Next Meetings (Bill Norris)

As noted the next VWP Citizen Advisory Group meeting has been scheduled for Thursday, January 8, 2015 – DEQ Piedmont Regional Office – Training Room – Sign-In: 9:15 A.M. – Meeting Start Time: 9:30 A.M.

24. Meeting Wrap-Up (Dave Davis):

Dave Davis thanked everyone for their participation today and their assistance and patience in getting this far through the proposed regulation revisions.

He noted that we will be getting back together for a "final" meeting of the advisory group on Thursday, January 8, 2015 to continue and complete our discussions of the proposed revisions.

He noted that we plan on starting discussions on January 8th with the surface withdrawal components of the regulations and then move into a discussion of the revisions to the General Permits (690). A questions was raised as to whether staff would be trying to incorporate the revisions recommended today in the main regulation to those affected portions of the general permits, especially since additional comments on 690 have also been submitted. *Staff Response: To the extent that we can but the main focus will be in getting the changes to 210 completed.*

A question was raised as to when the materials discussed today would be available. *Staff response: The materials reviewed today can be put on the web.*

A suggestion was made to just have another surface water meeting so that those edits can be wrapped up before moving forward. Don't have a meeting on "690" until "210" is wrapped up. It was suggested that the consideration of the edits on the surface water pieces be delayed until the rest of the regulation and general permits have been addressed because it is possible that we will be at a place with "surface water' where we either pull it all and only move stuff or address all of the proposed revisions – don't want to delay consideration of the wetland components trying to come to a resolution of the proposed surface water revisions. It was recommended that the meeting on the 8th start with the discussions of the changes to the general permits so that the conversations related to the changes to "210" that are reflected in "690" can be resolved prior to taking on the edits to the surface water withdrawal requirements.

25. Meeting Adjournment:

The meeting was adjourned at approximately 4:30 P.M.